RECENT DECISIONS.

ADMIRALTY—DAMAGES—APPORTIONMENT.—The libelant, a passenger on defendant ferryboat, descended from his carriage and, in walking forward on the boat, fell into an open coal hole left unguarded. It was found that there was negligence on the part of the boat, but that the libelant was also guilty of negligence. *Held*, the libelant should be awarded one-third of his damages. *Oppenheim* v. *The Lackawanna*, U. S. Dist. Ct. S. D. N. Y. Feb. 1907. See NOTES, p. 352.

AGENCY—NOTICE TO AGENT IS NOTICE TO PRINCIPAL—LIABILITY OF CARRIER.—An action was brought against a common carrier for the communication of smallpox to a passenger by a ticket agent who knew he had smallpox. *Held*, since the knowledge of the agent was the knowledge of the carrier, the latter was liable in damages. *Missouri, K. & T. Ry. Co.* v. *Raney* (Tex. 1907) 99 S. W. 589.

It does not seem that the defendant was held liable on the correct theory, because since the reason for charging the principal with knowledge is that the agent is supposed to represent the interest of the principal, *Bunton* v. *Palm* (Tex. 1888) 9 S. W. 182, when the interest of the agent is adverse to that of the principal, as in the principal case, the knowledge of the former is not imputed to the latter. *Bunton* v. *Palm*, supra; *Barnes* v. *Trenton Gas Light Co.* (1876) 27 N. J. Eq. 33; *Innerarity* v. *Merchant's Nat. Bank* (1885) 139 Mass. 332. The right conclusion was, however, reached in this case, for, when the contract of carriage is entered into, a duty arises on the part of the carrier to protect the passenger from torts at the hands of its servants, *Savannah Ry. Co.* v. *Quo* (1897) 103 Ga. 125; *Pittsburgh, etc., Ry. Co.* v. *Hinds* (1866) 53 Pa. St. 512, and it was a wrongful act on the agent's part to expose himself with knowledge of his contagious disease. *Smith* v. *Baker* (1884) 20 Fed. 709; cf. *Long* v. *Chicago etc. Ry. Co.* (1892) 48 Kans. 28.

BANKRUPTCY—DEBTS PROVABLE—TORT CLAIMS.—The plaintiffs brought a bill in equity to have their claim for negligence against the defendant, a bankrupt, liquidated and proved against the estate. Section 63a of the Bankruptcy Act enumerates the debts provable against a bankrupt's estate, but does not include tort claims not reduced to judgment. Section 63b allows unliquidated claims to be liquidated under the direction of the court and thereafter proved. Section 17a excepts from release by discharge in bankruptcy liabilities for several specified classes of torts, not, however, including negligence. *Held*, that as 63a was exclusive and controlling, the claim could not be proved. *Brown* v. *United Button Co.* (1907) 149 Fed. 49.

The court admits that §§ 63 and 17 are inconsistent, § 17, as amended, assuming that torts generally are provable—for only provable debts are dischargable—while the settled construction of § 63 denies any supplementary force to paragraph b and treats paragraph a as complete and exclusive. *Dunbar* v. *Dunbar* (1902) 190 U. S. 340, 350; *Crawford* v. *Burke* (1904) 195 U. S. 176, 186. Inasmuch, however, as § 63 is devoted specifically to the subject, and conforms more closely to the commercial character of bankruptcy, it must control, even as against the later amendment of § 17. For a careful presentation of the other view, necessarily weakened by the principal case, see Collier, Bankruptcy, 4th ed., 442.

BANKRUPTCY—SEC. 67E OF ACT OF 1898—PRESENT FAIR CONSIDERATION.—Defendant had money on deposit with the bankrupts, substantially like a current bank account. The bankrupts, with intent to hinder and defraud other creditors, paid this account without any demand by defend-

ant, she receiving payment without knowledge of the fraud. *Held*, that defendant received the money for a present fair consideration, and the payment could not be set aside by the trustee under § 67e. *Wright* v. *Sampter* (1907) 36 N. Y. L. Jour. No. 143.

Section 67e is much stricter than the rule in equity. It requires "a present fair consideration." *In re Sawyer* (1904) 130 Fed. 384. Although a person who receives money in payment of a debt may be a holder for "valuable consideration," N. Y. Pers. Prop. Law. § 29, in an equity suit, yet § 67e demands a present consideration, so that the estate of the bankrupt be not diminished for the other creditors. *Sherman* v. *Luckhardt* (1903) 67 Kans. 682. It has, however, been erroneously assumed that § 67e simply reiterated the common law or state statutes, *Congleton* v. *Schreihofer* (N. J. 1903) 54 Atl. 144; and the principal case professed to be governed on this point by *In re Bloch* (1905) 142 Fed. 674, but in that case the court held only that § 67e codified the common law as to fraudulent intent, and was not considering the question of consideration. The purpose of the entire Act would have been best effectuated in the principal case by holding that the defendant did not receive the money for a present fair consideration.

CARRIERS—EMPLOYEES AS PASSENGERS.—A workman employed by the defendant was riding home from work on the defendant's car on a free ticket given him in accordance with a custom of the defendant, but not furnished as part of the contract of service. *Held*, that he was a passenger. *Traction Co.* v. *Romans* (Ind. 1907) 79 N. E. 1068.

The courts on this question are in irreconcilable conflict. *Ionne* v. *Ry. Co.* (1899) 21 R. I. 452; *Seaver* v. *Ry. Co.* (1860) 14 Gray 466; *McNulty* v. *Ry. Co.* (1897) 182 Pa. St. 479. Since there seems to be no doubt that an employee furnished with a pass good at all times and riding on it for recreation is a passenger, *Whitney* v. *Ry. Co.* (1900) 102 Fed. 850; *Doyle* v. *Ry. Co.* (1894) 162 Mass. 66, there would appear to be little reason for not holding an employee a passenger where the transportation is only to and from work; for, ordinarily, if the employee is not under the direction of or performing duties for the carrier, he is scarcely to be considered as in the carrier's service, whether riding in the car or sitting at home. Cases where the circumstances show that the employee's time for travel is regarded as part of the time of employment are exceptional. *Vick* v. *Ry. Co.* (1884) 95 N. Y. 267. Whether the transportation arrangement forms part of the contract of service, if material at all, would only strengthen the employee's case as indicating the existence of a consideration in labor given for his carriage. *Doyle* v. *Ry. Co.* (1896) 166 Mass. 492; see *Peterson* v. *Traction Co.* (1900) 23 Wash. 615, 645. Even if the carrier could by such a contract escape treating the employee as a passenger, *Wright* v. *Ry. Co.* (1898) 122 N. C. 852; *B. & O. Ry. Co.* v. *Clapp* (1904) 35 Ind. App. 403, the soundness of the principal case, where no contract of the sort was proved, is unimpaired.

CONFLICT OF LAWS—JURISDICTION TO APPOINT GUARDIAN OF THE PERSON.—A father and his infant child domiciled in Louisiana and the divorced wife, and mother, domiciled in Kentucky, all happening to be temporarily in Texas, the wife petitioned a Texas court to award her the custody of the child. *Held*, that a Texas court did not have jurisdiction. *Lanning* v. *Gregory* (Tex. 1907) 99 S. W. 542. See NOTES, p. 348.

CONSTITUTIONAL LAW—AMENDMENT OF CONSTITUTION—MANDATORY OR DIRECTORY PROVISIONS.—The constitution of Nebraska required that, when proposed amendments thereto are submitted to a vote of the people, said proposed amendments shall be "published at least once each week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives." These requirements were substantially observed but the proposed amendment was not published in one of the counties during one of the prescribed weeks. It was approved by a

majority of the electors. *Held*, that the will of the people should not be defeated by an unsubstantial non-compliance with self-imposed limitations which are merely directory. *State* v. *Winnett* (Neb. 1907) 110 N. W. 1113.

While the question as to whether constitutional provisions should ever be construed as directory merely is usually confined in each case to a specific provision, the weight of authority seems to favor construing them as uniformly mandatory. Cooley, Const. Lim. 7th Ed. 114; *Collier* v. *Frierson* (1854) 24 Ala. 100; *State* v. *Rogers* (1875) 10 Nev. 250; *Greencastle* v. *Black* (1854) 5 Ind. 557, 566. The decision in the principal case is in line with the minority view, *Washington* v. *Page* (1854) 4 Cal. 388; *Miller* v. *State* (1854) 3 Oh. St. 475, and while on its particular facts it seems unobjectionable practically, it supports a principle which is fundamentally dangerous. Cooley, supra, 214.

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—SEVERAL COUNTS PERTAINING TO ONE TRANSACTION.—The defendant had in his possession a check payable to himself which he was under obligation to cash and pay the proceeds to his principal. He cashed the check and embezzled the proceeds. On an indictment containing two counts, one charging him with the embezzlement of the money, the other with the embezzlement of the check, he was convicted as to the first count. On appeal from the conviction he was granted a new trial. *Held*, on retrial he could be tried on the two counts. *People* v. *Peck* (Mich. 1906) 110 N. W. 495.

An indictment which charges one transaction may contain several counts varied to meet different phases of proof. *State* v. *Harris* (1890) 106 N. C. 682. It would seem that since each count contains a separate offense, *Dealy* v. *U. S.* (1893) 152 U. S. 539; *Aaron* v. *State* (1863) 39 Ala. 75, 88, a conviction on one of these counts would be an acquittal on the others. Indistinguishable in principle are cases in which there is a conviction on a lesser crime included in a greater charged in the indictment, which conviction is in logic and by the great weight of authority, 6 COLUMBIA LAW REVIEW 261, an acquittal of the greater crime. Contra, *Trono* v. *U. S.* (1905) 199 U. S. 521. The court in the principal case by its decision, and its admission that the *Trono* case is not in force in its jurisdiction, but that on such cases its law is in accord with the weight of authority, takes an inconsistent attitude which is defensible only because it conforms with the prevailing tendency to disregard technicalities in criminal cases.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATUTE COMPELLING RAILROADS TO BUILD SIDETRACKS.—A statute in South Carolina provided that railroad companies should, upon application of private enterprises located within one-half mile of the railroad, furnish sidetracking facilities to such enterprises, the cost of building such sidetracks to be paid by these enterprises, but repaid by the railroad companies in annual installments of 20 per cent. of the freight collected. *Held*, the statute was unconstitutional. *Mays* v. *Seaboard Air Line Ry.* Co (S. C. 1906) 56 S. E. 30.

While common carriers are bound to provide adequate facilities for loading and unloading goods, *Covington Stockyards Co.* v. *Keith* (1891) 139 U. S. 128; Hutchison, Carriers, 2nd ed., § 295d, and under modern industrial conditions, sidetracks aid greatly and often are almost absolutely essential in such loading and unloading, no case has gone so far as to hold these a part of the adequate facilities which a railroad is under duty to provide. These are mere favors granted by the railroad within its discretion. *Jones* v. *Newport News etc. Co.* (1895) 65 Fed. 736. In the principal case, therefore, the statute in requiring the railroad to use its earnings in building sidetracks deprived the railroad of property without due process and was void. Obviously, the case would have been different had the statute provided that railroads must not discriminate between enterprises in substantially similar circumstances in furnishing such facilities. See *Ballentine* v. *Railroad* (1867) 40 Mo. 491: 6 COLUMBIA LAW REVIEW 451.

CONSTITUTIONAL LAW—FEDERAL JURISDICTION—DIVERSE CITIZENSHIP. —An insolvent Pennsylvania corporation desired to have a bill for a receiver brought in the federal court and to that end assigned some of its securities to a resident of New Jersey who gave no consideration therefor except his agreement to bring the bill for a receiver. *Held*, one justice dissenting, although the assignment was apparently absolute the complainant's interest in the matter was infinitesimal and the real interest in the suit remained in the assignor and the assignment was therefore a sufficient fraud upon the court's jurisdiction to defeat it. *Krieder* v. *Cole* (C. C. A. 3rd C. 1907) 149 Fed. 647. See NOTES, p. 350.

CONTRACTS—RESTRAINT OF TRADE—ARTICLES MADE UNDER SECRET PROCESS.—The plaintiff made a medicine under a secret process and sold it under a trade name, *viz.*, "Peruna," to those wholesalers only who had agreed to resell to certain retailers only. The defendant with knowledge of such contracts had fraudulently induced certain wholesalers to sell him "Peruna" in violation of their contracts with the plaintiff who asked an injunction against the defendant's inducing wholesalers to break their contracts with the plaintiff and selling the "Peruna" so obtained. *Held*, the contracts were not such reasonable restraints as equity would protect, articles made by secret processes not being entitled to exemption from the laws as to restraint of trade. *John D. Park & Sons Co.* v. *Hartman* (1907) Cir. Ct. App. 6th Circuit.

A trade secret protects its owner only against those who have learned the secret under a contractual or confidential obligation. *Tabor* v. *Hoffman* (1889) 118 N. Y. 31; *Chadwick* v. *Covell* (1890) 151 Mass. 190. One who fraudulently induces another to break his contract may be restrained by injunction, *Nashville Ry. Co.* v. *M'Connell* (1897) 82 Fed. 65; *Board of Trade* v. *Christie etc. Co.* (1905) 198 U. S. 236, but the contract must be shown to be in reasonable restraint of trade, *U. S.* v. *Addyston etc. Co.* (1898) 85 Fed. 271, or outside of such rules as in the case of contracts as to patented articles or trade secrets. *Bement* v. *National Harrow Co.* (1902) 186 U. S. 70. In distinguishing between trade secrets and articles produced under trade secrets the court disregards or disapproves of former authorities, *Dr. Miles Medical Co.* v. *Platt* (1906) 142 Fed. 606; *Dr. Miles Medical Co.* v. *Jayne Drug Co.* (1906) 149 Fed. 838; *Garst* v. *Charles* (1905) 187 Mass. 144, on the theory that freedom of traffic in the articles produced under a secret process is consistent with the value of the process since it does not involve exposure of the secret.

CORPORATIONS—RIGHT TO ACQUIRE THEIR OWN STOCK—CREATION OF TREASURY STOCK NOT A LEGITIMATE CORPORATE PURPOSE.—The prosecuting corporation gave its entire issue of stock to a subscribing corporation in consideration of the transfer to it of the "rights and everything" of the latter corporation under an agreement whereby seventy-five per cent. of the stock was to be returned for the creation of treasury stock to be sold as fully paid and non-assessable, and out of the proceeds working capital for the new corporation was to be secured. The corporation having implied power to acquire its stock for legitimate corporate purposes maintained that it was entitled to a reduction of the franchise tax to the extent of the stock thus acquired. *Held*, that the purpose of creating treasury stock under these circumstances was not a legitimate corporate purpose. *Knickerbocker Importation Co.* v. *State Board of Assessors*, March 4th, 1907, New Jersey Court of Errors and Appeals. See NOTES, p 346.

CORPORATIONS—RIGHT TO STOCK DIVIDENDS AS BETWEEN LIFE TENANT AND REMAINDERMAN.—A testatrix gave to her daughter the income of corporate stock for life with remainder over to the children of the life tenant. During the lifetime of the daughter, the capital stock of the corporation was increased from $400,000 to $600,000, and a stock dividend was issued to the shareholders to represent this increased stock. *Held*, that stock dividends are presumptively income and belong to the life

tenant, and only when proved to represent the natural increase and growth of the corporate property do they constitute capital and go to the remainderman. *Kalbach* v. *Clark* (Iowa 1907) 110 N. W. 599. See NOTES, p. 344.

DOMESTIC RELATIONS—CONTRACT BETWEEN HUSBAND AND WIFE.—The plaintiff made a separation agreement directly with the defendant, her husband, without the intervention of a trustee, he agreeing to pay her $75 monthly. A suit in equity was brought for installments which had accrued after their divorce and a partition of their property. *Held*, that any equitable defence might be set up, and hence there might be a reduction in the monthly payments proportionate to the decrease in the income from the property resulting from the partition, although by the agreement he was not entitled to such reduction. *Buttlar* v. *Buttlar* (N. J. 1906) 65 Atl. 485.

In this country, separation agreements, with or without a trustee, are binding as to their property clauses. 1 COLUMBIA LAW REVIEW 555. While the fiction of unity makes all contracts between husband and wife void at law, they are recognized in equity, *Wallingsford* v. *Allen* (1836) 10 Pet. 583, though only when perfectly fair to the wife, *Proetzel* v. *Schroeder* (1892) 83 Tex. 684; *Ireland* v. *Ireland* (1887) 43 N. J. Eq. 311, and to the husband, *Ximines* v. *Smith* (1873) 39 Tex. 49, semble, and rescission will be allowed for causes insufficient to rescind common-law contracts. *Hungerford* v. *Hungerford* (1900) 161 N. Y. 550. The liability does not rest upon grounds of contract, *Boland* v. *O'Neil* (1899) 72 Conn. 217, 220, but arises because the agreement, although not a contract, creates an equity. *Evans* v. *Evans* (1892) 93 Ky. 510. The dictum in *Buttlar* v. *Buttlar* (1898) 57 N. J. Eq. 645, 654, classing it as a legal liability, is opposed to principle and authority, and the principal case very properly disregards it.

EQUITY—INJUNCTION—INDICTABLE NUISANCE.—The attorney-general of the State of Arkansas sought to enjoin the defendants from operating a poolroom. *Held*, no injunction would be granted, since no property rights were threatened. *State* v. *Vaughan* (Ark. 1906) 98 S. W. 685. See NOTES, p. 357.

EQUITY—PUBLIC NUISANCE—RESTRAINT AT SUIT OF PRIVATE PERSON.—The defendants, managing a large department store in New York City, were about to construct a spur leading from a street railway into their store, for the purpose of running electric baggage cars over it at night. The plaintiff lived within fifty feet of the place where the tracks were to cross the sidewalk, but did not own the fee of the street, and sought to maintain an injunction suit on the ground that the laying of the tracks was not duly authorized. *Held*, Ingraham and Laughlin JJ. dissenting, that plaintiff was in a position to obtain relief. *Hatfield* v. *Straus* (1907) 102 N. Y. Supp. 934.

A private person, to maintain a suit for the restraint of a public nuisance, must show special and particular injury, 4 Pomeroy, Eq. Jur. § 1350, of a different character from the public injury, Wood, Nuisance § 646, or amounting in itself to a private nuisance to the plaintiff. *Yolo County* v. *Sacramento* (1868) 36 Cal. 193. In the principal case the plaintiff's property was situated, at a considerable distance from the spur, on a street through which electric cars were continually run, and in the midst of a great city, under which facts the case would not seem to present the requisites for equitable relief at the plaintiff's suit. *Rhymer* v. *Fretz* (1903) 206 Pa. St. 230; *Osborn* v. *B'klyn City R. R. Co.* (1866) 5 Blatch. 366; *Patterson* v. *Chic. D. & V. R. R. Co.* (1874) 75 Ill. 588. Cf. *Callanan* v. *Gilman* (1887) 107 N. Y. 360.

EVIDENCE—EXPERT TESTIMONY AS TO VALUE.—In an action for damages to real estate, caused by the operation of an elevated railway, an expert witness testified to a certain percentage of increase in values in the

neighborhood, and that the value of property along the line of the railroad would have increased in the same proportion, had the road not been built. *Held*, three justices dissenting, that the introduction of such testimony was not error. *Shaw* v. *N. Y. El. Ry. Co.* (N. Y. 1907) 79 N. E. 984.

The dissenting judges contended that expert evidence could not be admitted as to the value of neighboring property consistently with *Jamieson* v. *El. Ry. Co.* (1895) 147 N. Y. 322. That case held evidence, as to the value of property along the line of the railroad before and after the construction of the road inadmissible because its admission would precipitate a number of collateral issues, citing in support *Gouge* v. *Roberts* (1873) 53 N. Y. 619; *Huntington* v. *Attrill* (1890) 118 N. Y. 365; *Matter of Thompson* (1891) 127 N. Y. 463, all cases holding merely that the value of one piece of property could not be admitted as evidence to prove the value of other property. The principal case is clearly distinguishable in that the testimony admitted was as to a general rise in values. See *Livingston* v. *Met. Ry. Co.* (1892) 18 N. Y. Supp. 203.

EVIDENCE—HEARSAY—DECLARATIONS SHOWING INTENT.—The defendant was on trial for murder committed in an attempt to procure an abortion. The defense was that the deceased had killed herself while attempting to commit an abortion upon herself. To support this defense a declaration of the deceased made more than a year before her death to the effect that she had just committed an abortion upon herself and would repeat the operation whenever necessary was attempted to be introduced in evidence. *Held*, that the declaration was inadmissible. *Clark* v. *People* (Ill. 1906) 79 N. E. 941.

In a prosecution for murder whenever the defense is suicide, or death caused by the deceased's own act, the intention of the deceased to commit suicide or do the act in question becomes relevant, for what a man intends to do he is likely to do. 3 Wigmore, Ev. § 1726. Statements by the deceased that he has such intent are direct evidence of his intent and when offered testimonially by a third party should be admitted. *Com.* v. *Trefethen* (1892) 157 Mass. 180; *Mutual Life Ins. Co.* v. *Hillman* (1891) 145 U. S. 285. The principal case is based upon *Siebert* v. *People* (1892) 143 Ill. 571, itself largely decided upon the authority of *Com.* v. *Felch* (1882) 132 Mass. 22 which was overruled by *Com.* v. *Trefethen*, supra. Illinois should follow the lead of Massachusetts and abandon the illogical doctrine of *Com.* v. *Felch*.

EVIDENCE—RELEVANCY—TRUTH OF ALLEGED STATEMENT.—The defendant on trial for murder pleaded self-defense and testified that he had heard before the killing that decedent, a police officer, had clubbed and injured a man who had died as a result. The State attempted to prove that the man died from other causes. *Held*, the evidence was admissible. *Knapp* v. *State* (Ind. 1907) 79 N. E. 1076.

The ruling that evidence that a story is untrue is relevant to the issue of whether or not it was told is not without precedent. *Commonwealth* v. *Hourigan* (1889) 89 Ky. 305. The reasoning is that since truth-speaking is the usual and normal occurrence, it follows that to prove that there was no basis in fact for a statement tends to prove that it was not made. This reasoning seems sound. In practice, however, various motives actuating the person making the alleged statement must operate so generally that the evidence will ordinarily be of little or no probative value, and would only tend to confuse the jury. *People* v. *Thaw* (1907) N. Y. Sup. Ct.

MORTGAGES — AFTER ACQUIRED PROPERTY — BANKRUPTCY — PREFERENCES.—An Ohio corporation made a mortgage of present and after-acquired property. After default, a year later, the trustee under the mortgage took possession, and the next day a petition in involuntary bankruptcy was filed. *Held*, that the lien of the mortgage was valid

and could not be avoided under § 60a of the bankrupt law as a preference made within four months. *Fisher* v. *Zollinger* (1906) 149 Fed. 54.

As to the property in possession at the time of the mortgage, the taking possession by the trustee under the mortgage was analogous to the recording of an unrecorded mortgage, the lien being good between the parties in both cases, and the taking possession or the recording being material only to cut off the rights accruing to third parties. *Humphreys* v. *Tatman* (1904) 198 U. S. 91. As to the after-acquired property, the usual doctrine is that the lien becomes effectual in equity as soon as the property is acquired, a *novus actus interveniens* being necessary only to complete the legal lien; and by taking possession the trustee under the mortgage does not create the lien, but simply prevents the rights of third parties from intervening. *Chase* v. *Denny* (1881) 130 Mass. 568. The lien thus becomes effectual by the operation of the mortgage, and relates back to the date of the mortgage. *Peabody* v. *Landon* (1889) 61 Vt. 318. While the question has not been decided in Ohio, the courts would probably adopt the usual doctrine, see *Francisco* v. *Ryan* (1896) 54 Ohio St. 307, and since the federal courts follow the state courts as to the creation of the lien, *Thompson* v. *Fairbanks* (1904) 196 U. S. 516, the act of the trustee under the mortgage in taking possession would not seem to be a preference under § 60a.

MORTGAGES—INSURANCE BY MORTGAGOR FOR BENEFIT OF MORTGAGEE—APPLICATION OF INSURANCE MONEY ON INTEREST.—A $1200 mortgage for six years at 6 per cent, was given on property insured by the mortgagor for the benefit of the mortgagee. The first year's interest was paid, and shortly thereafter, on a partial loss by fire, $247.50 was paid to the mortgagee by the insurer. The residue of the property, after the fire, was not adequate security for the mortgage. The mortgagor having failed to pay the second annual interest, the mortgagee brought suit to foreclose the entire mortgage. The mortgagor claimed that the insurance money should be applied to pay this installment of interest, which application would leave nothing due on the mortgage, and hence would prevent foreclosure. But the mortgagee claimed that he should be allowed to hold, as trustee, the insurance money, as collateral, until the maturity of the debt; or he was willing to waive his right not to be compelled to receive partial payments before the maturity of the debt and apply this money directly to the reduction of the interest-bearing principal. *Held*, the mortgagor was entitled to have the insurance money applied on the interest due, and the petition for foreclosure should be dismissed. *Thorp* v. *Croto* (Vt. 1907) 65 Atl. 562. See NOTES, p. 355.

NUISANCE—PUBLIC—PRIVATE ACTION—SPECIAL DAMAGE.—The defendant erected and maintained a wharf and buildings on navigable waters without the required statutory license. The plaintiff sought to enjoin their maintenance as a public nuisance, alleging as special damage that the buildings were unsightly and decreased the value of her summer residence by obstructing the view. *Held*, this was not such special damage as entitled the plaintiff to a right of action. *Whitmore* v. *Brown* (Me. 1906) 65 Atl. 516.

Much conflict has resulted in the decisions from failure to correctly apply the test that the injury must be distinct in *kind*, as well as in degree from that suffered by the public, to entitle a private person to maintain an action for a public nuisance. *Dudley* v. *Kennedy* (1874) 63 Me. 465; *Blackwell* v. *Old Colony Ry. Co.* (1877) 122 Mass. 1. The damage alleged by the plaintiff satisfies this test, but fails because it is not legal damage. Mere pecuniary loss is not sufficient. There must be an invasion of some private legal right. *Swanson* v. *Mississippi etc. Co.* (1890) 42 Minn. 532, 535. The right of view is not claimed as an easement, which in this country could only arise by grant.

PLEADING AND PRACTICE—AMENDMENT—STATUTE OF LIMITATIONS.—The plaintiff sued the defendant as trustee under a will. Later she

amended her complaint whereby she sued the defendant individually. The defendant pleaded the Statute of Limitations. It appeared the statutory period had expired before the amendment, but after the beginning of the action. *Held*, that the Statute ceased to run when the suit was first brought and not when the amendment was made. *Boyd* v. *U. S. Trust Co.* (N. Y. 1907) 79 N. E. 999.

In addition to permitting a change of nominal parties, which is really no amendment, *Fuller* v. *Webster Ins. Co.* (1856) 12 How. Pr. 293, the New York courts permit amendments changing the capacity in which parties are sued. *Tighe* v. *Pope* (1878) 16 Hun 180. The latter practice is illogical because in contemplation of law a person sued in a representative capacity is different from that person sued individually. In the former case that which is recovered comes from the estate which the defendant represents, while in the latter it comes from him individually. See *Collins* v. *Hydorn* (1892) 135 N. Y. 320; *Leonard* v. *Pierce* (1905) 182 N. Y. 431; *Erskine* v. *McIlrath* (1895) 60 Minn. 485. Therefore the practice should be restricted, and the ordinary incidents of amendments as to the Statute of Limitations should not apply. The principal case cannot be upheld.

PLEADING AND PRACTICE—EQUITY—DISCOVERY OF STOCKHOLDERS' ADDRESSES.—An action was brought against two hundred and forty defendants, stockholders of a corporation, to compel the payment of unpaid subscriptions. A proceeding was directed against an officer of said corporation to obtain the addresses of these stockholders alleging that they could be obtained in no other way. *Held*, that the court might properly refuse that said officer should be sworn. *Union Collection Co.* v. *Superior Court, etc.* (Cal. 1906) 87 Pac. 1035.

The defendant in the bill of discovery need not be a defendant in the action for the furtherance of which the bill is brought, if he has some interest in its subject matter. *The Murillo* (1873) 28 L. T. N. S. 374; *Morse* v. *Buckworth* (1703) 2 Vern. 443; *Heathcote* v. *Fleete* (1702) 2 Vern. 442. Where the liability of a group of persons is shown, discovery of the names and addresses of the individuals composing it has been granted. *Murray* v. *Clayton* (1872) L. R. 15 Eq. Cas. 115; *Post* v. *Toledo, Cin. & St. L. Ry. Co.* (1887) 144 Mass. 341; *Clark* v. *R. I. Locomotive Works* (1902) 24 R. I. 307. Though in the principal case the names were known, still the parties had not been served, and it was necessary to know their whereabouts to maintain the suit against them, hence the discovery should have been granted.

PLEADING AND PRACTICE—JURISDICTION OF CIRCUIT COURT OF APPEALS.—An appeal was taken to the Circuit Court of Appeals from a denial of a motion to dismiss for want of jurisdiction, arising from improper service of process. Section 5, U. S. Comp. St., 1901, p. 547 provided that where the jurisdiction of the Circuit Court is at issue, or any case which involves the constitutionality of any law of the United States or the validity or construction of any treaty, appeal shall be taken to the Supreme Court, and § 6 gives appellate jurisdiction to the Circuit Court of Appeals in all other cases. *Held*, that these statutes do not allow the Circuit Court of Appeals to pass on the question of jurisdiction here presented. *Boston & M. Ry. Co.* v. *Gokey* (1906) 149 Fed. 42.

This decision follows the rule laid down in *U. S.* v. *Lee Yen Tai* (1902) 113 Fed. 465 and *Fisheries Co.* v. *Lennen* (1904) 130 Fed. 533, which were based on the interpretation of the above statutes in *U. S.* v. *Jahn* (1894) 155 U. S. 109 and *Carter* v. *Roberts* (1899) 177 U. S. 496, holding that the Circuit Court of Appeals must certify to the Supreme Court all cases mentioned in § 5 above. This interpretation has been reconsidered in *American Sugar Refining Co.* v. *New Orleans* (1901) 181 U. S. 277, holding that where the jurisdiction of the Circuit Court rested on any constitutional question the Circuit Court of Appeals had no appellate jurisdiction, but where the jurisdiction of the Circuit Court was invoked in the first instance on the ground of the diverse citizenship

of the parties, the Circuit Court of Appeals did not lose appellate jurisdiction because some of the constitutional questions arose after such jurisdiction had attached. The facts of the principal case gave jurisdiction to the Circuit Court of Appeals under this rule and the court erred in refusing to decide the constitutional question presented. *Filhiol* v. *Maurice* (1902) 185 U. S. 108; *Huguley Mfg. Co.* v. *Galeton Cotton Mills* (1902) 184 U. S. 290; *City of Owensboro* v. *Owensboro Waterworks Co.* (1902) 115 Fed. 318.

PLEADING AND PRACTICE—SURPRISE—NEW TRIAL.—The defendant was sued for taxes assessed on the theory that he resided in Plymouth. He claimed that he lived at Woodstock and the suit was tried on the issue as to whether he had moved to Woodstock from Plymouth. The Court, while not deciding that he did not live at Woodstock, found that he apparently resided in Sherbourne which was not claimed. *Held*, that a new trial would be granted to the plaintiff on the ground of surprise, it appearing that the decision would probably have been different in view of the fact conceded later that the defendant had no residence in Sherbourne. *Coolidge* v. *Taylor* (Vt. 1907) 65 Atl. 582.

Since ordinary prudence would not have guarded the plaintiff against the surprise produced by the judgment, and all the other necessary elements were present, the court's discretion in the principal case was properly exercised. *Schellhous* v. *Ball* (1866) 29 Cal. 605; *Levy* v. *Brown* (1850) 11 Ark. 16. The case is noteworthy in that the defendant not only did not intend to surprise the plaintiff but was also himself surprised, although not legally grieved. Cf. *Romeyn* v. *Sickles* (1888) 108 N. Y. 650.

REAL PROPERTY—EJECTMENT—DEED OF INSANE PERSON.—In a suit for ejectment in which the plaintiffs claimed as heirs at law of Michael Flynn, defendants set up a deed by Michael Flynn to defendants' grantor under which defendants claimed title. The plaintiffs sought to prove that Michael Flynn was insane at the time of making the deed. *Held*, Clarke, J. dissenting, that a deed regular on its face by a grantor who has not been adjudged incompetent will be presumed valid in ejectment until set aside for the grantor's incompetency by a decree in equity. *Smith* v. *Ryan* (1906) 101 N. Y. Supp. 1011.

The deed or contract of a person who is in such a diseased mental condition as to prevent his understanding the nature of the transaction should, in principle, be absolutely void. 6 COLUMBIA LAW REVIEW 115. This rule is logically applied in the case of deeds, at common law, *Thompson* v. *Leach* (1697) 3 Salk. 300, and in some of the United States, *Dexter* v. *Hall* (1872) 15 Wall. 9; *Elder* v. *Schumacher* (1893) 18 Colo. 433; *Farley* v. *Parker* (1876) 6 Or. 105; *German Savings and Loan Society* v. *De Lashmutt* (1895) 67 Fed. 399, including New York, *Van Deusen* v. *Sweet* (1873) 51 N. Y. 378; but see contra, *Blinn* v. *Schwarz* (1904) 177 N. Y. 252, attempting to distinguish *Van Deusen* v. *Sweet*, supra. Hence a plaintiff in ejectment claiming as heir and met by a deed of the ancestor should be permitted to prove the insanity of the ancestor, since insanity should logically render the deed void, and the plaintiff has a good legal title upon which to base his ejectment. Authorities supra, and see, *Babcock* v. *Clark* (N. Y. 1904) 93 App. Div. 119. Cf. *Wilcox* v. *American Telephone and Telegraph Co.* (1903) 176 N. Y. 115. But inasmuch as the principal case adopts the prevailing but erroneous view that the deed of an insane person before a judicial declaration of insanity is voidable merely, *Allis* v. *Billings* (Mass. 1843) 6 Met. 415; *Blinn* v. *Schwarz* (1904) 177 N. Y. 252; *Key* v. *Davis* (1851) 1 Md. 32; 1 Parsons, Contracts, 8th ed., *384, the conclusion that the plaintiff must have the insane person's deed set aside in equity before bringing ejectment is sound, since he has no legal title upon which to base his ejectment. *Key* v. *Davis*, supra, 39, semble; and see *Hall* v. *La France Fire Engine Co.* (1899) 158 N. Y. 570.

SALES—RESCISSION FOR FRAUD—INTENTION NOT TO PAY.—A contract for the sale of goods was made in good faith, title to pass in the future.

When the goods were received under the contract, however, it was with an intention not to pay for them. *Held*, there could be no rescission for fraud. *In re Levi & Picard* (1906) 148 Fed. 654.

When at the time of the purchase, the buyer has formed the intention of not paying for the goods, the vendor may rescind as the act of making the contract is a representation that he intends to pay. *Fox* v. *Webster* (1870) 46 Mo. 181; *Jaffrey* v. *Brown* (1886) 29 Fed. 476. Where the intention not to pay is not formed till after the contract is made, there can be no rescission, *Starr Bros.* v. *Stevenson* (1894) 91 Ia. 684; *Burrill* v. *Stevens* (1882) 73 Me. 395; *Ex parte Whittaker* (1875) L. R. 10 Ch. Ap. 446, 449; contra, *Whitten* v. *Fitzwater* (1891) 129 N. Y. 626; for, although receiving the goods is a representation of an intention to pay for them, yet as this act must be subsequent to the tender, the vendor cannot have relied on it. Since, therefore, a positive duty to make known this intention would have to be imposed, and since this is not only extraordinary but contrary to the common law principle of independent vigilance in commercial affairs, the principal case is correct. Cooley, Torts, 2nd ed., 557.

SURETYSHIP—RIGHTS AGAINST SURETY—PRINCIPAL CONTRACT VOID.—Under a statute which provided that when a public officer entered into a contract for the purpose of making public improvements a bond should be given, A made a contract with the city to pave its streets with the brick of a particular manufacturer. This contract was void because in violation of a state statute. An action was brought on a bond conditioned that A shall pay for labor and materials furnished. *Held*, that the surety was liable. *Kansas City Hydraulic Brick Co.* v. *National Surety Co.* (1907) 149 Fed. 509.

The principal case is not correctly decided, as the surety cannot be held when there is no principal contract, whether because of an authorized change in the terms of the contract, *Keith County* v. *Ogalalla Power and Irrigation Co.* (1902) 64 Neb. 35, or because of lack of consideration or "mutuality," *Moffett* v. *City of Goldsborough* (1892) 52 Fed. 560, or for any other reason; I Brandt, Suretyship, 3rd ed., § 19; nor should he be held when the principal contract is void because its making or performance involves the breaking of a statute. *Thorne* v. *Travelers Ins. Co.* (1875) 80 Pa. St. 15; *McCanna* v. *Citizens Trust and Surety Co.* (1896) 76 Fed. 420; *Daniels* v. *Barney* (1864) 22 Ind. 207.

TORTS—CHARITABLE INSTITUTIONS—LIABILITY FOR NEGLIGENCE.—The manager of the defendant hospital, a charitable institution, failed to disclose the contagious character of a patient's disease to the plaintiff, the nurse in charge, who thereby contracted the disease. *Held*, the defendant was liable for negligence. *Hewett* v. *Association* (1906) 73 N. H. 556.

The plaintiff, while a patient in the defendant hospital, a charitable institution, was injured through the gross negligence of a nurse. *Held*, the defendant was exempt from liability, not only for the negligence of the nurse, but also for its own negligence in selecting the nurse, an incompetent employee. *Adams* v. *Univ. Hospital* (Mo. 1907) 99 S. W. 453.

The plaintiff, the employee of a contractor for the defendant church was injured through the collapse of a scaffolding, furnished by the church and defective through its negligence. *Held*, on demurrer, the defendant, though a charitable institution, was liable, because the plaintiff was not a beneficiary. *Bruce* v. *Central etc. Church* (Mich. 1907) 110 N. W. 951. See NOTES, p. 353.

TORTS—NEGLIGENCE—VIOLATION OF SPEED ORDINANCE BY STREET RAILROAD.—In an action for the death of one struck by a street car, the plaintiff attempted to prove a violation of a speed ordinance at the time of the accident. *Held*, the violation was no evidence of negligence. *Ford's Adm'r* v. *Paducah City Ry. Co.* (Ky. 1907) 99 S. W. 355.

The principal case is not supported outside of Kentucky. Violation

of municipal law is held to be negligence per se, *Terre Haute etc. Ry. Co.* v. *Voelker* (1889) 129 Ill. 540; *Pennsylvania Co.* v. *Horton* (1892) 132 Ind. 189; *Messenger* v. *Pate* (1876) 42 Ia. 443; *Butz* v. *Cavanaugh* (1896) 137 Mo. 503, or at least evidence of negligence. *Hayes* v. *Mich. Cent. Ry. Co.* (1884) 111 U. S. 228; *Hanlon* v. *S. Boston etc. Ry. Co.* (1880) 129 Mass. 310; *McGrath* v. *N. Y. C. & H. R. Ry. Co.* (1876) 63 N. Y. 522; *Connor* v. *Traction Co.* (1896) 173 Pa. St. 602. The rule deducible from principle and authority would seem to be that when the court can say as a matter of law that the exact consequences against which the ordinance was intended to provide have actually ensued from its violation, the act is negligence per se; otherwise it is evidence of negligence. 3 COLUMBIA LAW REVIEW 344; and see *Hayes* v. *Mich. Cent. Ry. Co.* supra; *Foster* v. *Swope* (1890) 41 Mo. App. 137. Applying this rule in the principal case it seems that the court should have admitted the evidence to prove negligence per se.

TRUSTS—DUTY OF TRUSTEE TO FORM A SINKING FUND.—A testamentary trustee invested funds in securities purchased at a premium. The beneficiaries were a life tenant and a remainderman. *Held*, that it was the duty of the trustee in the absence of an express direction in the will to the contrary, to preserve the principal from loss on account of the premium, by deducting enough from the income to make good the amount paid. *Stevens* v. *Brooks* (1907) 36 N. Y. L. Jour. No. 144.

The case of *McLouth* v. *Hunt* (1897) 154 N. Y. 179, founded the rule in New York, that whether the life tenant or remainderman was to stand the loss, depended upon the intention of the testator as manifested by the language employed, the relations of the parties, and all the surrounding circumstances. This case was followed in the *Matter of Hoyt* (1899) 160 N. Y. 607, where the life tenant was not charged, and in *N. Y. Life Ins. etc. Co.* v. *Baker* (1901) 165 N. Y. 484, where the court found a contrary intention. The reason given for the more arbitrary rule of the principal case, *Hite* v. *Hite* (1892) 93 Ky. 257; *Shaw* v. *Cordis* (1887) 143 Mass. 443, accord—that a trustee would always act at his peril in determining a testator's intention, is of no greater weight here than in any other discretionary acts of a trustee. The rule is sure to work hardship in many cases.

WATERS AND WATER-COURSES—NATURE OF RIGHT TO ACCRETION.—A strip of land about one hundred feet back from the shore was dedicated for a street. The land was gradually eroded to a point beyond the inner line of the strip but subsequently by accretion was extended for a distance beyond the outer line. *Held*, the public use revived. *Elliot* v. *Atlantic City* (1907) 149 Fed. 849.

When land is gradually encroached upon by river or sea, title goes to the state. *Matter of Hull etc. Ry.* (1839) 5 M. & W. 327; *Trustees, etc.* v. *Kirk* (1881) 84 N. Y. 215; *Wilson* v. *Shively* (1884) 11 Ore. 215. It is obvious, then, that if alluvion be subsequently added the riparian owner must take by the law of accretion and not by virtue of his original ownership of the area so filled in. *Welles* v. *Bailey* (1887) 55 Conn. 292; *Naylor* v. *Cox* (1892) 114 Mo. 232; contra, *Mulry* v. *Norton* (1885) 100 N. Y. 424, semble. Thus he is not entitled to alluvion forming within the area originally owned by him but detached from the shore, *Cox* v. *Arnold* (1895) 129 Mo. 337; *Wallace* v. *Driver* (1896) 61 Ark. 429, and even if a shifting river imperceptibly submerges all of a riparian property the property next inland becomes riparian and upon the river imperceptibly returning toward its old course the owner of the latter property is entitled to all the new accretion. *Welles* v. *Bailey*, supra. If a fee may be thus extinguished and a new fee established over the same area, it must follow that the plaintiff's new land in the principal case, being in nowise dependent upon his original ownership, should have been held free from the previously existing easement. Distinguish *Douglas* v. *Coonley* (1898) 156 N. Y. 521, 12 Harv. Law Rev. 356.

WILLS—DEPENDENT RELATIVE REVOCATION.—The testator's will was found in a box containing his private papers, with pencil marks and interlineations on the face of the will and a light pencil mark through his signature. *Held*, that all the circumstances showed that the marks were intended only in preparation of a new will, and therefore the will was not revoked. *Matter of Raisbeck* (N. Y. 1906) 52 Misc. 279.

As there cannot be a cancellation of a clause in a will in New York, *Lovell* v. *Quitman* (1882) 88 N. Y. 377, the only question in the case was whether the cancellation was a revocation of the whole will. The act of cancellation being equivocal, *Semmes* v. *Semmes* (Md. 1826) 7 H. & J. 388, the court takes into consideration all the circumstances of the case and if these show that the intention to revoke is merely part of a larger intention to make a new will, no revocation results until the second will is made. *Bethell* v. *Moore* (N. C. 1837) 2 D. & B. 311; *Onions* v. *Tyrer* (1716) 2 Vern. 742. In the principal case the striking out of the testator's signature showed an intention to revoke, 1 Woerner, Law of Adm. 93, whereas the other marks and interlineations showed an intention to make them simply in preparation of a new will, and as this intention was not carried out, the court in the principal case correctly applied the doctrine of dependent relative revocation.